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8 Attorneys for Defendant  
9 THE WOLF FIRM, A Law Corporation, erroneously  
10 sued herein as THE WOLF LAW FIRM, A Law Corporation

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**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**

VICTORIA A. AMELINA, an individual;  
and A.A.;D.S.; and B.S., each individuals  
and minors by and through their Guardian  
Ad Litem, Victoria A. Amelina,

Plaintiffs.

vs.

MANUFACTURERS and TRADERS  
TRUST COMPANY aka M&T BANK,  
SAFEGUARD PROPERTIES, LC and  
THE WOLF LAW FIRM, A Law  
Corporation,

Defendants.

Case No.: 3:14-CV1906-WQH-NLS  
Assigned for all Purposes to:  
The Honorable William Q. Hayes

**OPPOSITION OF DEFENDANT THE WOLF  
FIRM TO PLAINTIFFS' MOTION FOR  
LEAVE TO AMEND AND FILE THIRD  
AMENDED COMPLAINT**

DATE: January 19, 2016  
TIME: N/A  
DEPT: N/A

NO ORAL ARGUMENT UNLESS  
REQUESTED BY THE COURT

Complaint Filed : August 13, 2014  
Trial Date : None Set

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1                   **MEMORANDUM OF POINTS AND AUTHORITIES**

2                   **1. INTRODUCTION**

3                   This lawsuit arises from facts related to plaintiff VICTORIA  
4                   AMELINA (“plaintiff”) and her ownership of residential real property  
5                   located in San Diego, California (the “Property”). After defaulting on her  
6                   loan, non-judicial foreclosure proceedings were initiated by the  
7                   substitute trustee, defendant THE WOLF FIRM, A Law Corporation,  
8                   erroneously sued herein as THE WOLF LAW FIRM, A Law Corporation  
9                   (“Wolf”). Plaintiff alleges that Wolf’s conduct violated the Fair Debt  
10                  Collection Practices Act (“FDCPA”). Although plaintiff has added  
11                  additional facts to each of her successive amended complaints in an  
12                  effort to sufficiently allege facts against defendant Wolf to assert a claim  
13                  for violation of the FDCPA, the law remains clear that in the Ninth  
14                  Circuit, non-judicial foreclosure activities are not considered debt  
15                  collection within the scope of the FDCPA – and, even if they were,  
16                  plaintiff has still not sufficiently alleged that Wolf was a “debt collector”  
17                  as defined by the FDCPA. Plaintiff has had her proverbial “three bites at  
18                  the apple”, to no avail. She should not be entitled to a fourth “bite”,  
19                  especially as the proposed Third Amended Complaint does not add any  
20                  new facts that suggest that Wolf acted beyond its scope as foreclosure  
21                  trustee. For that reason, plaintiff’s motion for leave should be denied.  
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1   **2. WHILE LEAVE TO AMEND IS WITHIN THE DISCRETION OF THE**  
 2   **COURT, LEAVE SHOULD BE DENIED WHEN FURTHER**  
 3   **AMENDMENT IS FUTILE.**

4       Fed. R. Civ. P. 15(a)(2) provides that “a party may amend its  
 5       pleading only with the opposing party’s written consent or the court’s  
 6       leave. The court should freely give leave when justice so requires.” As  
 7       the U.S. Supreme Court stated, “if the underlying facts or circumstances  
 8       relied upon by a plaintiff may be a proper subject of relief, he ought to be  
 9       afforded an opportunity to test his claim on the merits.” *Foman v. Davis*,  
 10      371 US 178, 182 (1962). The *Foman* court thereafter suggested certain  
 11      factors that could provide a court with reason to deny leave: (1) undue  
 12      delay; (2) bad faith or dilatory motive on the part of the movant; (3)  
 13      repeated failure to cure deficiencies by amendments previously allowed;  
 14      (4) undue prejudice to the opposing party; and (5) futility of amendment.  
 15      *Id.*; *Carvalho v. Equifax Info Servs., LLC*, 629 F.3d 876, 892-893 (9<sup>th</sup> Cir.  
 16      2010).

17           The foregoing “*Foman* factors” are especially relevant in the  
 18       instant case, and in particular, the point that any further leave would be  
 19       futile. *Leadsinger v. BMG Music Pub*, 512 F.3d 522, 532 (9<sup>th</sup> Cir. 2008).

20           In the instant matter, plaintiff’s clear dilemma is that non-judicial  
 21       foreclosure activity is not covered within the parameters of the FDCPA in  
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1 the jurisdiction covered by the Ninth Circuit. *Hulse v. Ocwen Federal*  
2 *Bank, FSB*, 195 F.Supp.2d 1188, 1204 (D. Ore 2002); *Izenberg v. ETS*  
3 *Services, LLC*, 589 F.Supp.2d 1193, 1199 (C.D. Cal. 2008); *Makreas v.*  
4 *First Nat'l. Bank of Northern California*, 856 F.Supp.2d 1097, 1101 (N.D.  
5 Cal. 2012).

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7 As to Wolf, plaintiff concedes that Wolf only communicated with  
8 plaintiff upon being substituted in as the foreclosure trustee on or about  
9 April 28, 2014. Thereafter, all communications with Wolf pertained to  
10 Wolf's statutory notice requirements. The proposed Third Amended  
11 Complaint (proposed "TAC") [MFL, Exhibit "A"] and Exhibit 7 confirm that  
12 the April 28, 2014 "letter" was a Notice that foreclosure activity had  
13 begun at the direction of M&T Bank, that there was a default, and  
14 provided both the amount in default and the outstanding balance, among  
15 other notices. Nowhere within that first letter was there a provision that  
16 plaintiff "pay back the money or else foreclosure activity would proceed."  
17 [SAC, ¶¶113, 118.] Indeed, the letter was accompanied by the Notice of  
18 Default. Thus, foreclosure activity had begun. [MFL Ex 7.]  
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24 Plaintiff previously alleged that Wolf was attempting to collect a  
25 debt, and communicated with plaintiff in an effort to harass and  
26 intimidate plaintiff. [SAC, ¶¶114, 120.] However, while the April 28<sup>th</sup>  
27 letter is entitled, "Notice Under Fair Debt Collection Practices Act" and  
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1 further includes a disclaimer that Wolf “is acting as a debt collector and  
2 attempting to collect a debt,” these provisions on the letter are simply  
3 disclaimers used in caution. Such language on a law firm’s letterhead  
4 “without more, [does] not transform the firm into a debt collector for all  
5 purposes … [and] is insufficient to raise a triable issue of fact on the  
6 question of the firm’s status as a debt collector.” *Golliday v. Chase*  
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8 *Home Fin., LLC*, 761 F.Supp.2d 629, 636 (W.D. Mich. 2011).

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10 In a recent decision very similar to the instant case, *Cochran v.*  
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12 *The Bank of New York Mellon Trust Company, NA*, No. CV 15-3209-  
13 GHK (JCx) (C.D. Cal. July 29, 2015), the court specifically addressed  
14 the “debt validation” letters often included with or around the time of the  
15 notice of default, and held that such letters (so-called “dunning” letters)  
16 were part of non-judicial foreclosure activities.  
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19 Moreover, plaintiff concedes in her proposed TAC that Wolf’s  
20 principal business purpose is expansive. Plaintiff’s proposed TAC  
21 alleges that “for over twenty-five years, [Wolf has] regularly ‘provided a  
22 broad array of legal and related services throughout California and  
23 nationally to lenders, servicers, investors, governmental agencies and  
24 other members of the financial services community’ through ‘cradle-to-  
25 grave services’ that include Collection, Replevin/Claim and Delivery,’ ...”  
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27 [MFL Ex “A”, ¶43.] However, “debt collection that is only ‘some part’ of a  
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1 defendant's business is insufficient to state a claim under the FDCPA."

2 *Schlegel v. Wells Fargo Bank, NA*, 720 F.3d 1204, 1209 (9<sup>th</sup> Cir. 2013).

3 In short, plaintiff's proposed allegations concede that debt collection is

4 not the principal purpose of Wolf; rather, it has a broad array of services,

5 including collection.

6 This is plaintiff's fourth opportunity to allege facts that Wolf's

7 conduct went beyond its foreclosure-related obligations, and, once

8 again, her efforts have failed. Further amendment, therefore, is clearly

9 futile.

10 As such, plaintiff's motion seeking leave to amend should be

11 denied.

12 **3. CONCLUSION**

13 Plaintiff has now had three attempts to allege facts sufficient to

14 state a cause of action against Wolf for violating the FDCPA. Plaintiff's

15 proposed fourth attempt clearly alleges that Wolf neither is a debt

16 collector as defined by the FDCPA nor conducted itself in a manner that

17 exceeded the scope of its statutorily mandated foreclosure activities.

18 Further leave would, thus, be futile.

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For the foregoing reasons, plaintiff's motion for leave to amend and file a Third Amended Complaint should be denied.

Date: December 30, 2015

# THE WOLF FIRM, A LAW CORPORATION

By: /s/ Abe G. Salen  
Abe G. Salen  
Attorneys for Defendant  
THE WOLF FIRM, A Law  
Corporation, erroneously sued herein  
as THE WOLF LAW FIRM, A Law  
Corporation

## CERTIFICATE OF SERVICE

I am over the age of eighteen years and not a party to nor interested in the  
within action. My business address is 2955 Main Street, Second Floor, Irvine,  
California 92614.

A true and correct copy of the foregoing document(s), entitled:

**OPPOSITION OF DEFENDANT THE WOLF FIRM TO PLAINTIFFS' MOTION FOR  
LEAVE TO AMEND AND FILE THIRD AMENDED COMPLAINT**

will be served or was served (a) on the judge in chambers in the form and manner required by Local Rule (“LR”) 5.4.

- 1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF):** Pursuant to controlling General Orders, the foregoing documents will be served by the Court via NEF and hyperlink to the document. On December 30, 2015, I checked the CM/ECF docket for this matter and determined that the following persons on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated on the attached service list.
- 2. SERVED BY UNITED STATES MAIL:** On December 30, 2015, I served the following persons and/or entities at the last known address in this case by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid and addressed as follows.
- 3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL** (state the method for each person or entity served): Pursuant to F.R.Civ. P. 5 and/or controlling local rules, \_\_\_\_\_, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the Judge here constitutes a declaration that personal service on overnight mail to, the judge will be completed no later than by 12:00 p.m. (Noon) the following business day. Service information continued on attached service list.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on December 30, 2015, at Irvine, CA.

/s/ Jess Ramos  
Jess Ramos

## SERVICE LIST

VICTORIA A. AMELINA, et al. vs. MANUFACTURERS and  
TRADERS TRUST COMPANY, et al.

Case No. 14CV1906-WQH-NLS

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